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Issue Date: 24 April 2003

CASE NO.: 2003 -CAA- 11

IN THE MATTER OF

SHARYN ERICKSON,
Complainant

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
REGION IV, ATLANTA, GEORGIA
Respondent

ORDER GRANTING RESPONDENT'S MOTION TO COMPEL AND DENYING RESPONDENT'S MOTION FOR AN *IN CAMERA* REVIEW OF RECORDS

On April 23, 2003, Respondent filed a Motion to Compel Complainant to Properly and Fully Respond to Respondent's First and Second Request for Interrogatories and Request for Production of Documents, and filed a Motion to Conduct an *In Camera* Review of Complainant's Privilege Log to Determine Whether Claimed Documents are Protected by Attorney Client/Work Product Privilege.[1] Respondent timely served its Interrogatories and Requests for Production on Complainant on March 17 & 27, 2003. Pursuant to my Pre-Hearing Order, all discovery had to be completed thirty days before the formal hearing scheduled for May 13, 2003. Complainant served answers to Respondent's discovery requests on April 14, 2003. After receiving Complainant's discovery responses, Respondent wrote an amicable demand to Complainant on April 17, 2003. In Respondent's Motion to Compel, it presented the following alleged deficiencies in Complainant's answers:

[1] The last day for service on all non-dispositive motions in this matter is twenty days prior to the formal hearing on May 13, 2003. Respondent's Motions are timely.

Interrogatory 1. Identify all harassing actions directed toward or taken against Complainant for allegedly being late for work to which Complainant refers in her March 10, 2003 Amended Complaint. Regarding such alleged harassing actions, (a) identify with specificity any and all gestures, statements, and behavior made or exhibited by Mr. Barrow that Complainant alleges as "continually harassing" and (b) identify any other EPA personnel or contractor that Complainant alleges have harassed her since the issuance of Judge Kennington's decision.

Complainant's response: See attached emails and amended sworn complaint, and motion for partial summary judgment in Erickson II. Incorporated by reference pursuant to 29 C.F.R. § 18.1 & F.R.Civ. P. 33(d).

Complainant's response is evasive and fails to answer the question. Her reference to unidentified emails fails to comply with her duty to respond fully to reasonable discovery requests. Complainants' response does not provide specific information regarding alleged harassing behavior, statements and gestures allegedly exhibited by Mr. Barrow, and other employees toward her. The agency has a right to have its interrogatories responded to truthfully, fully and in good faith. A full and complete response will assist the agency adequately prepare for the hearing and preclude attempts by Complainant's counsel to sandbag the agency at the hearing. Respondent, therefore, moves the court to compel Complainant to respond fully and completely to this interrogatory.

Ruling on Interrogatory 1

I find merit in Respondent's argument. Complainant's response is evasive. Respondent is entitled to know what "harassing actions" were directed toward Complainant, as asserted in her complaint, for allegedly being late for work and who undertook those actions. Complainant has until April 28, 2003, to fully respond to this interrogatory.

Interrogatory 2. Identify the "new contract specialist" position to which Complainant refers in her March 10, 2003 Amended Complainant, stating (a) whether Complainant applied for the position, (2) identifying the division and branch in which the position is located, (b) identifying the selecting official that filled the position, (4) identifying the grade and series of the position, and (c) identifying the date on which the position was filled.

Complainant's response. Ty Weaver was the new contract specialist. It is irrelevant when he was chosen or whether I applied, because Respondent knew of my desire to return to contracting, needed an experienced contracting person, and excluded me from my career field for pretextual reasons previously rejected by Judge Kennington

in the September 24, 2002 RDO. Therefore, hiring anyone other than me was retaliatory.

Complainant's response is ambiguous and evasive. A complete response will enable the Respondent to determine, before the hearing, whether this allegation is timely raised, is barred by res judicata, or is properly raised in view of the filing of Respondent's petition for review, which renders the RDO inoperative. The agency, therefore, moves the court to compel Complainant to respond to this discovery.

Ruling on Interrogatory 2

I find that Complainant's response is incomplete. Complainant failed to identify the referenced contract specialist position, and failed to state whether she applied for the position. If Complainant has knowledge of the division and branch, the selecting official, the grade and series and the date the position was filled she should either provide that information or assert that she has no knowledge. Complainant has until April 28, 2003, to fully and completely answer this interrogatory.

Interrogatory 4. In accordance with Complainant's allegations in her Amended Complaint dated March 10, 2003, identify the number of times Mr. Barrow has left notes on Complainant's desk, chair and her door?

Complainant's response: See attached copies of emails, incorporated herein by reference pursuant to 29 C.F.R § 18. 1 & F.R.Civ. P. 33(d). I don't know all of the times because I was not initially keeping records every time it happened. I started keeping records on advice of counsel; those communications are privileged. See privilege log to be provided by Ms. Erickson.

Complainant's response is evasive and an attempt to withhold relevant and material information. To invoke the attorney client privilege, the Complainant must establish that: (1) legal advice was sought; (2) from a professional legal adviser in his or her capacity as such; (3) communication relates to that purpose; (4) was made in confidence; and (5) by the client. Pursuant to the Fed.R.Civ. P. 26(b)(3) the following conditions must be satisfied by the proponent in order to establish the work product protection: (1) the material must be a document or tangible thing; (2) it must be prepared in anticipation of litigation; and (3) it must be prepared by or for a party, or by or for its representative. Records generated and maintained by Complainant during the ordinary course of business are not protected by the attorney client or work product privilege. The documents that Complainant alleges she started keeping were created during the normal course of business. As such, they are not protected by the attorney client/work product privilege.

> The agency moves the court to compel Complainant to provide all copies of records that she created and maintained relating to this request.

Ruling on Interrogatory 4

Respondent is entitled to know the number of times Mr. Barrow left notes on her desk, chair, or door in regards to the actions alleged in the complaint. If Complainant does not know the actual number, she should so state, but Complainant is compelled to give an estimate. Regarding the documentation by Complainant created on the direction of her counsel, I find that the document is likely protected by the work product and/or the attorney-client privilege, but I am unable to definitively make that determination after reviewing Complainant's privilege log.

The work-product doctrine provides an attorney with a zone of privacy where the attorney can work "free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). The work product doctrine is broader than the attorney-client privilege. *United States v. Nobles*, 422 U.S. 225, 238 n.11, 95 S. CT 2160, 45 L. Ed. 2d 141 (1975). One seeking discovery of a work-product must show substantial need because the work product reflects the "mental impressions, conclusions, opinions or legal theories of an attorney." Fed. R. Civ. P. 26(b)(3) (2001). To show that the work product privilege applies, a party should demonstrate that: (1) information requested is either documents or otherwise tangible, (2) document was prepared in anticipation of litigation, and (3) document was prepared by or for party's representative; additionally, the party must demonstrate that document was prepared principally or exclusively to assist in anticipated or ongoing litigation. Fed. R. Civ. P. 26(b)(5) (2002); *Scakman v. Leggit*, 920 F. Supp. 357, 266 (E. D. NY. 1996). The work product privilege should be asserted in a privilege log. *Advanced Display Systems, Inc., v. Kent State University*, 212 F.3d 1272, 1280 (5th Cir. 2000); *In re Allen*, 106 F.3d 582, 599 (4th Cir. 1997).

"The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice." *In re Grand Jury Subpoenas*, 803 F.2d 493, 496 (9th Cir. 1986). The attorney-client privilege is limited to "only those disclosures - necessary to obtain informed legal advice - which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 1577, 48 L. Ed. 2d 39 (1976). The party asserting the privilege has the burden of proof. *In re Grand jury Investigation*, 947 F.2d 1068, 1070 (9th Cir. 1992). To show that the attorney-client privilege attaches to discoverable information, the parties should demonstrate:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily

> either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Allen, 106 F.3d 582, 600 (4th Cir. 1997).

"A party that fails to submit a privilege log is deemed to waive the underlying privilege claim." *In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001). A privilege log should contain:

> To properly demonstrate that a privilege exists, the privilege log should contain a brief description or summary of the contents of the documents, the date the document was prepared, the person or persons who prepared the document, the person to whom the document was directed, or for whom the document was prepared, the purpose in preparing the document, the privilege or privileges asserted with respect to the document, and how each element of the privilege is met as to that document. . . . The summary should be specific enough to permit the court or opposing counsel to determine whether the privilege asserted applies to that document.

Smith v. Dow Chemical Co. PPG et al., 173 F.R.D. 54, 57-58 (W.D. N.Y. 1997)(citations omitted).

Reviewing Complainant's privilege log, I find that it fails to meet the above requirements. Complainant has until April 28, 2003 to serve a revised copy of her privilege log on Respondent. The log must specifically demonstrate how her records concerning Mr. Barrow's notes fall within an applicable privilege. Regardless of the privilege asserted to the underlying documentation, Respondent is entitled to information concerning the number of times Mr. Barrow has left notes on Complainant's desk, chair and her door. Complainant has until April 28, 2003, to serve a full and complete response to this interrogatory.

> **Interrogatory 6.** Identify dates, places, times and the circumstances surrounding Mr. Barrow allegedly asking Complainant how long she spends in the bathroom. 6a. State Complainant's response to Mr. Barrow on each occasion that he allegedly asked her how long she spends in the bathroom. 6b. Provide certified copies of all notes, memoranda, or other documents that Complainant has in her possession that relates to Mr. Barrow's alleged questions about the time she spends in the bathroom.
>
> Complainant's response: I didn't record every date because I really didn't want to have to discuss the issue in a hearing, until I finally started to make records and sent my counsel a message. See privilege log to be provided by Ms. Erickson.
>
> The claim of privilege is a ruse to avoid responding to the discovery request. Complainant has not demonstrated that the attorney client privilege is applicable. She has not established that (1) legal advice was sought; (2) from a professional legal adviser in his or her capacity as such; (3) the communication relates to that purpose;

(4) was made in confidence; and (5) by the client. Pursuant to the Fed.R.Civ. P. 26(b)(3), the following conditions must be satisfied by the proponent in order to establish work product protection: (1) the material must be a document or tangible thing; (2) it must be prepared in anticipation of litigation; and (3) it must be prepared by or for a party, or by or for its representative. Records generated and maintained by Complainant during the ordinary course of business are not protected by the attorney client or work product privilege. The documents that Complainant alleges she started keeping were created during the normal course of business, which were subsequently provided to her counsel. This type of communication is not protected by the attorney client/work product privilege.

The agency moves the court to compel Complainant to respond fully to this interrogatory and to provide copies of all records related to this interrogatory.

Ruling on Interrogatory 6

I find that Complainant's response is insufficient. Respondent is entitled to know dates, places, times, and circumstances surrounding Mr. Barrow allegedly asking Complainant how long she spends in the bathroom, and Complainant's response on each occasion. Any record made by Complainant concerning those instances that was not created at the direction of her counsel should be provided to Respondent. As noted, *supra*, I do not find Complainant's privilege log is sufficient to determine if an applicable privilege applies to records she made after speaking to her attorney. Complainant has until April 28, 2003 to answer this interrogatory to the best of her ability, to turn over any non-privileged records, and to submit a revised privilege log that meets the requirements outlined above.

The Agency's Second Interrogatories and Request for Production of Documents.

Interrogatory 1. State and describe with specificity the question that Complainant asked Russell Wright on November 6, 2002 at the meeting that Complainant references in her amended sworn complaint in paragraph 4.

Complainant's response: Will supplement - unable to answer today because EPA did not give Ms. Erickson enough time off with administrative leave to answer these burdensome oppressive interrogatories, added at the last minute as retaliation. See Ms. Erickson's March 31, 2003 Motion for Protective Order, for which reconsideration is requested and should be granted should EPA file any motion to compel without cooperating with ins. Erickson on giving her time to complete her response.

Complainant alleges Russell Wright subjected her to retaliation and humiliation when he responded to a question that she asked at a meeting in November, 2002. Respondent seeks specific information concerning the question asked by Complainant. This question is relevant, material, not overly burdensome, or time consuming. This information is relevant to Complainant's claim of retaliation and to the agency's ability to defend against this claim. Complainant's failure to answer the interrogatory constitutes bad faith and evasion. Complainant's behavior also demonstrates a recalcitrant resistance to reasonable discovery requests. Respondent moves the court to compel complainant to respond fully and completely to this interrogatory.

Ruling on Interrogatory 1

Complainant's Motion for a Protective Order was denied on two separate occasions by this Court. Complainant must fully answer this interrogatory by April 28, 2003.

Interrogatory 2 State whether other employees asked questions of Russell Wright at the meeting. If other employees asked questions, state and describe with specificity the questions that were asked of Russell Wright by other employees and Mr. Wright's response to the employee's questions.

Complainant's response: Will supplement - unable to answer today because EPA did not give Ms. Erickson enough time off with administrative leave to answer these burdensome oppressive interrogatories, added at the last minute as retaliation. See Ms. Erickson's March 31, 2003 Motion for Protective Order, for which reconsideration is requested and should be granted should EPA file any motion to compel without cooperating with Ms. Erickson on giving her time to complete her response.

Complainant's response is a blatant refusal to answer an interrogatory that seeks information regarding a material claim raised in Complainant's complaint. Further, Complainant's response fails to comply with Judge Kennington's decision that denied her motion for protective order. The response constitutes bad faith and a recalcitrant resistance to reasonable discovery requests. Respondent moves the court to compel complainant to respond fully and completely to this interrogatory.

Ruling on Interrogatory 2

Complainant's Motion for a Protective Order was denied on two separate occasions by this Court. Complainant must fully answer this interrogatory by April 28, 2003.

Interrogatory 4. Identify all medical doctors that have examined Complainant relating to her claims of a hostile environment at EPA. With respect to all medical. doctors, identify the dates on which Complainant was examined, the name of the doctor, and the doctor's diagnosis and prognosis of Complainant based on each examination.

Complainant's response: See evidence in Erickson I and attached records (including pending appointment if applicable), incorporated by reference pursuant to 29 C.F.R. § 18.1 & F.R.C.P Civ. P. 33(d).

This response is evasive and incomplete. Complainant does not identify any doctors, dates, or diagnosis and prognosis of doctors that may have occurred after September 24, 2002. Further, Complainant's references F.R.C.P. Civ. P. 33(d) but fails to include any documents in her response. Complainant has a duty to disclose information pursuant to reasonable discovery requests so that Respondent counsel has a reasonable opportunity to prepare effectively for cross examination and to arrange for expert testimony from other witnesses, if deemed necessary.

The agency moves the court to compel Complainant to fully respond to this request and to produce all medical documents that they will introduce at the hearing.

Ruling on Interrogatory 4

This is a new whistleblowing complaint with new issues arising after the issuance of my September 24, 2002, Recommended Decision and Order. Complainant's assertion that medical documents were previously provided to Respondent in the earlier litigation is insufficient and the requested medical documentation must be turned over by April 28, 2003. However, because this case only concerns activities occurring after September 24, 2002, and many of the requested documents that Respondent is entitled to are identical to those provided in the earlier litigation, Complainant may stipulate to the authenticity of the documents provided to Respondent in the earlier litigation rather than reproducing them.

Complainant's Privilege Log

Respondent objects to Complainant's privilege log arguing that it fails to sufficiently identify the nature of communications to enable Respondent to determine if a privilege is properly invoked. Respondent further objected to Complainant's non-disclosure of November 6, 2002 meeting notes, arguing that no privilege attached to those records. Respondent also requests the Court to conduct an *in camera* review of the allegedly privileged documents. As noted *supra*, I find that Complainant's

privilege log is insufficient. Complainant has until April 28, 2003, to submit a privilege log that complies with the requirements outline above. Accordingly, an *in camera* review of documents is DENIED at this time.

ORDER

1. Complainant has until April 28, 2003, to serve full and complete responses to Agency's Interrogatories and Requests for Production of Documents Directed To Complainant Nos. 1, 2, 4 & 6, and to serve full and complete responses to agency's Second Interrogatories and Request for Production of Documents Directed to Complainant Nos. 1, 2, & 4.

2. Complainant has until April 28, 2003, to serve a privilege log on Respondent in conformity with the requirement listed in *Smith, supra*.

3. Complainant has until April 28, 2003, to produce documents in relation to Agency's Interrogatories and Requests for Production of Documents Directed To Complainant Nos. 4 & 6 to the extent such documents are not privileged as detailed in Complainant's revised privilege log.

4. Respondent's Motion to Conduct an *In Camera* Review of Complaint's Privilege Log to Determine Whether Claimed Documents are Protected by Attorney Client/Work Product Privilege is DENIED.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE